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Supreme Court, U.S.
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No. 01-60

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY SNEAD,
Petitioner

v.

METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY, A DELAWARE CORPORATION; JAMES MCINTOSH,
Respondents

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court's rejection of a federal burden-shifting formula is substantive law that must be applied by federal courts sitting in diversity on a state claim under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

2. Whether disability discrimination claims alleging a failure to provide reasonable accommodation should be evaluated using the traditional pretext analysis for employment discrimination claims or whether, since such claims are not disparate treatment claims but involve an affirmative statutory obligation, the pretext analysis is inappropriate.

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IN THE SUPREME COURT OF THE UNITED STATES

Emily Snead, *Petitioner*

v.

Metropolitan Property & Casualty Insurance Company, a Delaware Corporation; James McIntosh, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Emily Snead respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix, *infra*, 1a-30a) is reported at 237 F.3d 1080 (C.A.9 2001). By order entered April 5, the Ninth Circuit denied the petition for rehearing and the petition for rehearing en banc (Appendix, *infra*, 31a-32a). The district court decision is unreported (Appendix, *infra*, 33a-45a).

JURISDICTION

On January 23, 2001, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. On April 5, 2001, the United States Court of Appeals for the Ninth Circuit entered its order denying the timely petition for rehearing and the petition for rehearing en banc of Emily Snead. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes involved are as follows:

28 U.S.C. § 1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regard as rules of decision in civil actions in the courts of the United States in cases where they apply.

Oregon Revised Statutes 659.400(1) and (2)

> As used in ORS 659.400 to 659.460, unless the context requires otherwise:
>
> > (1) "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.
> >
> > (2) As used in subsection (1) of this section:

(a) "Major life activity" includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(b) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(c) "Is regarded as having such an impairment" means that the individual:

(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(C) Has none of the impairments described in subparagraph (A) or (B) of this paragraph, but is

treated by an employer or supervisor as having a mental or physical impairment that substantially limits one or more major life activities.

(d) "Substantially limits" means:

(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

Oregon Revised Statutes 659.436

(1) It is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because an otherwise qualified person is a disabled person.

(2) An employer violates subsection (1) of this section if the employer does any of the following:

(a) The employer limits, segregates or classifies a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because the applicant or employee is a disabled person.

(b) The employer participates in a contractual or other arrangement or relationship that has the effect of subjecting an otherwise qualified job applicant or employee who is a disabled person to the discrimination prohibited by ORS 659.436 to 659.449, including but not limited to participating in a relationship with an employment or referral agency, a labor union, an organization providing fringe benefits to an employee of the employer, or an organization providing training and apprenticeship programs.

(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

(d) The employer excludes or otherwise denies equal jobs or benefits to an otherwise qualified person because the person is known to have a relationship or association with a disabled person.

(e) The employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity.

(h) The employer fails to select and administer tests relating to employment in the most effective manner to ensure that when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude or other characteristics of the applicant or employee that

> the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant. The provisions of this paragraph do not limit the ability of an employer to select or administer tests designed to measure sensory, manual or speaking skills of an employee or job applicant.

STATEMENT OF THE CASE

Facts

Only a brief synopsis of the facts is necessary to consider the question presented.

Petitioner Emily Snead is a former employee of Metropolitan Property and Casualty Insurance Company ("Met"). Snead was hired by Met in 1989 as a Market Development Manager. CR 25, p. 83 (Pl. Depo. 212). Plaintiff's manager was Jim McIntosh. In 1995, Snead went out on disability leave after being stalked and threatened by a former employee of Met. CR 25, p. 80 (Pl. Depo. 185); CR 25, p. 9-12 (Pl Aff.). Snead was diagnosed with post traumatic stress disorder. CR 25, p. 9-12, 13-19 (Pl Aff.; Attachment A to Pl. Aff.).

In early 1997, Snead informed Met that she was able to return to work. CR 25, p. 33, 68, 89, 125-126 (Pl. Depo. 5, 118; Pl. Ex. 14; Dineen Depo. 37). Although it was Met's policy to place individuals returning from disability leave into their same position or an equivalent on, Snead was informed by Mr. McIntosh that her former position was no longer available. CR 25, p. 47 (Pl. Depo. 35). However, there is evidence that the decision to excess Snead's position was made after she notified Mr. McIntosh she had been released to return to work, not before. CR 25, p. 95-97 (McIntosh Depo.

11-13). Mr. McIntosh told her there was a possibility that she could be moved into some form of position they would create for her, a "quasi" PCS position. CR 25, p. 45 (Pl. Depo. 33). Snead told him she needed to have specifics about job descriptions and pay. CR 25, p. 45 (Pl. Depo. 33). There is evidence in the record that Mr. McIntosh misrepresented Snead's statements to others at Met and falsely indicated Snead had stated she was not mobile and would not consider a different position. CR 25, p. 46-47, 64 (Pl. Depo. 34-35, 105); CR 25, p. 129 (Pl. Ex. 18). Snead was subsequently terminated without being restored to any position with Met, supposedly in part because her request for clarification about other positions arrived too late. CR 25, p. 136 (Pl. Ex. 27); CR 25, p. 138 (Pl. Ex. 29)

Snead offered other evidence that the reason for her termination was suspicious and actually based upon her record of a disability or Met's perception of her as disabled such as Met's agents' treatment of Snead before and after her disability leave and evidence that Met's assertions that the Oregon market was diminishing was contradicted.

Proceedings Below

Petitioner Snead brought this action in state court alleging disability discrimination under state law, ORS 659.436. The case was removed to the United States District Court for the District of Oregon under diversity jurisdiction. Snead alleged that after she notified her employer that she was ready to return to work following a long-term disability leave, Defendants, Met and McIntosh, discriminated against her on the basis of a record of a disability or on their perception of Snead as disabled. Defendants moved for summary judgment on Snead's claim. The District Judge granted Defendants' motion for summary judgment and dismissed the action.

In a 2-1 opinion, the Ninth Circuit affirmed the District Court holding that the *McDonnell Douglas* burden-shifting analysis applied to the state-based claim and that Snead had failed to present a material question of fact as to whether Defendants' articulated reasons for terminating her were pretextual under this analysis.

REASONS FOR GRANTING THE WRIT

I. The Significance of the Questions Presented

The decision of the Ninth Circuit Court of Appeals in this case instructs federal courts sitting in diversity to apply an interpretation of federal law to state claims even when that interpretation has been expressly rejected by the state courts and does affect the outcome of the litigation.

This case examines the reach of the *Erie* doctrine. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court read the Rules of Decision Act to command that "[e]xcept in matters governed by the Federal Constitution of by Acts of Congress, the law to be applied in any case is the law of the State." Thus, "[f]ederal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but does not carry with it generation of rules of substantive law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

The Ninth Circuit's decision in this case, however, frustrates this established body of law by intruding upon a state's power to define and declare substantive law for state-created rights.

As discussed below in greater detail, Oregon has established state laws prohibiting various types of employment discrimination. *See* Oregon Revised Statutes ("ORS") chapter 659. Congress has also enacted federal laws prohibiting

certain types of employment discrimination. *See* 42 U.S.C. §§ 2000e *et seq.* (Title VII); 42 U.S.C. §§ 12101 (Americans with Disabilities Act); 29 U.S.C. §§ 621 (Age Discrimination in Employment Act). While Oregon courts have found federal cases instructive in interpreting state statutes, Oregon case law also recognizes differences between federal laws and state laws. Significantly, Oregon courts have rejected the burden-shifting formula adopted by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), for employment discrimination claims. *Callan v. Confederation of Oregon School Admin.*, 717 P.2d 1252, 1254 (Or.App. 1986); *Henderson v. Jantzen, Inc.*, 719 P.2d 1322, 1324 (Or.App.), *rev. denied*, 726 P.2d 934 (Or. 1986). Whether or not the *McDonnell Douglas* burden-shifting formula is *itself* a procedural device rather than substantive law does not dictate the contours of Oregon substantive law. Oregon has specifically rejected the *McDonnell Douglas* burden-shifting formula as being inconsistent with its interpretation of Oregon employment discrimination statutes. Instead, Oregon has established different standards for determining whether a plaintiff has established a jury question on a state-based claim. These standards established by Oregon courts for state-based claims must be applied by federal courts hearing the state claims when sitting in diversity. To allow otherwise intrudes upon a state's authority to define its own law for state-based rights and to have that law be applied even when the state claim is before a federal court.

The Ninth Circuit's opinion in this case conflicts with other cases recognizing that federal courts must apply state law on burdens of proof to other types of state claims. *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (stating the issue of who bears the burden of proof on an issue is a matter of state law); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 356 (C.A.9 1996) (applying state law regarding proof of damages on

breach of contract claim); *Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248, 253 (C.A.7 1996), *cert. denied*, 520 U.S. 1167 (1997).

The Ninth Circuit's holding in this case is not limited to the issue of employment discrimination claims but involves the fundamental issue of a state's power to define substantive law for state-based claims. Allowing the Ninth Circuit's opinion to stand permits a significant intrusion upon individual state's rights in the federal system and the *Erie* doctrine.

Another significant issue presented by the instant case is whether the *McDonnell Douglas* pretext analysis is applicable to disability discrimination claims involving an employer's failure to reasonably accommodate a disabled employee. The pretext analysis was established to aid courts in evaluating disparate treatment cases and is essentially a tool to determine the employer's motivation behind its treatment of a given employee. Reasonable accommodation is an affirmative, objective duty of employers that is not determined by the employer's subjective state of mind. Thus, the pretext analysis is inapplicable to reasonable accommodation claims, yet the Ninth Circuit opinion advises otherwise.

II. The Ninth Circuit Erred In Holding That Oregon's Rejection Of The *McDonnell Douglas* Burden-Shifting Formula For Employment Discrimination Claims Was Procedural Rather Than Substantive Law.

The Ninth Circuit's decision in this case is based upon the conclusion that Oregon's rejection of the *McDonnell Douglas* shifting burden formula is not outcome determinative and thus is a procedural device which does not govern state claims heard in federal court under the *Erie* doctrine. However, this conclusion is incorrect. A closer examination of

the approach developed by Oregon courts for Oregon discrimination claims reveals that the approach is outcome determinative and thus is state substantive law which must be applied by federal courts sitting in diversity.

A. Under Oregon Law Plaintiff Need Not Establish Pretext.

Oregon has explicitly rejected the burden-shifting analysis for claims brought under Oregon state anti-discrimination laws. *Callan v. Confederation of Oregon School Admin., supra*, 717 P.2d at 1254; *Henderson v. Jantzen, Inc., supra*, 719 P.2d at 1324. In *Callan*, the court noted that "[w]hether the proposition is that there is a first or second shifting of the burden of proof, the objective of finding facts correctly is not advanced by the artifice of making a chronological progression of evidentiary burdens the basis for deciding whether either party is entitled to survive the other's motion for summary judgment or a directed verdict." 717 P.2d at 1254-1255 fn. 3. Under Oregon law then, "[a] plaintiff's *prima facie* case does not disappear merely because a defendant asserts a nondiscriminatory reason which may or may not persuade the trier of fact." *Henderson, supra*, 719 P.2d at 1324 (citations omitted).

In contrast, under federal law, once a defendant articulates a legitimate, nondiscriminatory reason for its action, "the presumption raised by the *prima facie* case is rebutted" and "drops from the case." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10 (1981). Under federal law then, to get to a jury a plaintiff must produce evidence from which a jury could find that the defendant's proffered reasons are not true but are pretexts for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. ---, 120 S.Ct. 2097, 2106 (2000). However, under Oregon law, a plaintiff

need not rebut defendant's proffered reason. *McPhail v. Milwaukie Lumber*, 999 P.2d 1144, 1149 (Or.App. 2000). Rather, "[i]t is sufficient in Oregon for the plaintiff to show that the unlawful motive was a substantial and impermissible factor" in the adverse employment action. *Id.*

B. Oregon's Non-Burden-Shifting Analysis Is Substantive, Not Procedural.

The *McDonnell Douglas* burden-shifting analysis was developed by the Supreme Court to analyze Title VII of the Civil Rights Act of 1964 and has been extended by courts to analyze other federal employment discrimination statutes based upon Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see, e.g., Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1121 (C.A.9 2000) (en banc), *cert. granted*, 121 S.Ct. --- (2001). In rejecting the burden-shifting analysis, Oregon courts were not interpreting federal laws but were interpreting Oregon statutes. The Oregon courts' interpretation of those substantive statutes is part of the substantive law of those statutes.

The decisions in *Callan* and *Henderson* do not simply establish a summary judgment procedural device, but rather those decisions establish what evidence a plaintiff must present to get a state employment discrimination claim before a jury. The cases establish the quantum of evidence necessary to present a question of fact for the jury. Under Oregon law, then, once plaintiff has presented a *prima facie* case, there is sufficient evidence for a jury to find in plaintiff's favor. *Henderson, supra*, 719 P.2d at 1324. On the other hand, federal law as developed under the *McDonnell Douglas* formula imposes a different standard for an employment discrimination plaintiff to reach a jury. That standard requires evidence of pretext. *McDonnell Douglas, supra*, 411 U.S. at

802.

The differences in the standards is reflected in a recent decision by the Oregon Court of Appeals. *McPhail, supra,* 999 P.2d at 1149. In *McPhail*, defendant argued at summary judgment that the plaintiff in an employment discrimination case would be unable to persuade a reasonable jury that the employer's stated reasons for terminating plaintiff were only pretexts. *Id.* The court rejected that argument stating defendant's "argument appears to be based in part on the federal burden-shifting approach to civil rights law, in which the plaintiff must show that the defendant's explanation for the challenged action was only a pretext. Oregon has rejected that approach." *Id.*, citing *Callan, supra*, 717 P.2d at 1254-1255. The court concluded that "[i]t was sufficient in Oregon for the plaintiff to show that the unlawful motive was a substantial and impermissible factor in the discharge decision." *Id.* (citation omitted). Thus, a showing of pretext is simply not part of a plaintiff's burden to reach a jury on an Oregon state statutory discrimination claim.

C. Properly Analyzed The Result Would Be The Same On The State Claim At Summary Judgment And At Directed Verdict.

The Ninth Circuit concluded that "[t]he only significant difference between the state and federal regimes is *when* a case that fails one of the *McDonnell Douglas* components will be dismissed." *Snead, supra*, 237 F.3d at 1091 (emphasis in original). The example is given that a plaintiff whose case could not survive summary judgment in federal court "would only delay the inevitable by proceeding in state court where, on the same record, a nonsuit or JNOV would be in order at the close of the plaintiff's case." *Id.* The error in the court's reasoning is that, under the panel's example, assuming plaintiff

presented a *prima facie* case of discrimination under Oregon law, a nonsuit or directed verdict would not be in order at the close of plaintiff's case on that state claim. As stated, in *Callan, supra*, the shifting evidentiary burden was not helpful to motions either for summary judgment *or motions for a directed verdict*. 717 P.2d at 1254-1255 fn. 3 (emphasis added). In addition, under both federal law and Oregon law, the standards for a directed verdict mirror the standards for summary judgment. *Reeves, supra*, 120 S.Ct. at 2110; *Fieux v. Cardiovascular & Thoracic Clinic, P.C.*, 978 P.2d 429, 432 (Or.App.), *rev. denied*, 994 P.2d 123 (Or. 1999) (on ruling a motion for a directed verdict, court must view evidence and all reasonable inferences in light most favorable to plaintiff to determine if there is a jury question). However, the grant of a judgment *n.o.v.* involves an even stricter standard under Oregon law. Judgments *n.o.v.* are improper if there is *any* evidence to support the verdict. *Holman v. Pacific Health & Life Co.*, 902 P.2d 106, 108 (Or.App. 1995). Thus, if on the record, summary judgment is inappropriate on the state claim, then on that same record a directed verdict would also be inappropriate.

Contrary to the Court's fundamental assumption, under Oregon law, a reasonable jury can find for an employment discrimination plaintiff without explicitly or implicitly finding that defendant's proffered non-discriminatory reasons for a challenged discharge are pretextual. Under Oregon law, a plaintiff need only show that discrimination was "a substantial and impermissible factor in the decision." *McPhail, supra*, 999 P.2d at 1149. Thus, even in the absence of evidence of pretext an Oregon jury could accept a defendant's proffered reason and still conclude that discrimination was a substantial factor, although not necessarily the only factor, in defendant's decision and thus render a verdict for plaintiff. However, in federal court, absent proof of pretext as required by the

McDonnell Douglas burden-shifting formula, such a plaintiff would lose at summary judgment. Therefore, the outcome of such a case would be dependent upon the forum, federal or state, where the case was heard. Whether or not the *McDonnell Douglas* formula is itself procedural as to federal claims, Oregon has rejected the formula and imposed different substantive law with respect to proof of Oregon state discrimination claims.

D. Inconsistencies Between Forums Would Result From The Current Opinion.

The Ninth Circuit's decision creates a situation where a plaintiff in state court who has established a *prima facie* case of discrimination will reach a jury and potentially prevail, but that same plaintiff proceeding in federal court would lose his or her case at summary judgment without a showing of pretext and never have the opportunity to present the case to a jury. The holding makes it more difficult for plaintiffs to prevail in federal court on Oregon discrimination claims than it would be for them to prevail in state court. If federal courts ignore Oregon's rejection of the burden-shifting formula, then substantial variations between state and federal judgments are inevitable. Litigants have a substantial interest in having a uniform outcome regardless of where the case is pursued. Thus, Oregon's rejection of the federal burden-shifting approach significantly affects the result of litigation. Since Oregon's law is outcome determinative, it is substantive law which under the *Erie* doctrine should be applied by federal courts sitting in diversity. *Gasperini, supra*, 518 U.S. at 427 (citation omitted).

In addition, applying Oregon's standard for state-based employment discrimination cases to federal diversity cases would further the twin aims of the *Erie* rule: discouragement

of forum-shopping and avoidance of inequitable administration of the laws. *Gasperini, supra*, 518 U.S. at 428 (citation omitted). By not applying the Oregon standard in federal courts, non-resident defendants will be encouraged to routinely remove Oregon employment discrimination claims to federal court to avail themselves of the federal burden-shifting formula. An inequity is created between nonresident defendants who can remove such actions and resident defendants who cannot. When a federal court applies Oregon's rejection of the burden-shifting approach to cases it hears in diversity, the result is discouragement of forum shopping and uniform enforcement of Oregon anti-discrimination laws.

E. Oregon's Constitution Requires Reversing The Decision.

Oregon has a significant state interest in ensuring that the right to a jury trial for plaintiffs pursuing Oregon claims is preserved. The Oregon Constitution prohibits reexamination of facts tried by a jury unless a court can affirmatively say there is no evidence to support the verdict. Or. Const., Art. VII, § 3. In *McPhail*, the court cited this constitutional provision in support of the rejection of the requirement of proof of pretext in discrimination cases. The *McPhail* court noted that the argument that there was insufficient evidence to establish the employer's proffered explanations were pretextual "appears to be asking [the court] to evaluate how strong plaintiff's case would appear to a jury, something that we cannot do if there is any evidence in the record that would support a verdict in plaintiff's favor." *McPhail, supra*, 999 P.2d at 1149, citing Or. Const. Art. VII (Amended), §3, and Oregon case law. Thus, by failing to apply Oregon law to diversity cases, federal courts impair Oregon plaintiffs'

constitutional right to a jury trial.

III. Disability Discrimination Claims Involving the Failure To Reasonably Accommodate An Individual With A Disability Should Not Be Evaluated Using A Pretext Analysis.

After improperly determining that federal standards should apply to Snead's state-based disability discrimination claim, the Ninth Circuit proceeded to analyze whether Snead had presented evidence raising a question of fact that Defendants' proffered reason for terminating Snead was pretextual. As Judge Lay recognized in his dissent, the majority's pretext analysis raised another legal error. *Snead*, 237 F.3d at 1095.

"*McDonnell Douglas* and subsequent decisions have 'established an allocation of the burden of production and order for the presentation of proof in . . . discriminatory-treatment cases.'" *Reeves, supra*, 120 S.Ct. at 2106, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (emphasis added). The final stage in the *McDonnell Douglas* burden-shifting analysis is that the plaintiff must show that the reason articulated by the employer for the adverse action is pretextual. *McDonnell Douglas*, 411 U.S. at 802. The pretext analysis is thus a method to determine the employer's subjective motivation in its treatment of a certain employee.

One form of discrimination recognized by both federal and state laws regarding disability discrimination is an employer's failure to provide reasonable accommodation to individuals with disabilities. *See* 42 U.S.C. § 12112(b)(5)(a); ORS 659.436(2)(e). Under federal law as well as under Oregon state law, an employer thus has an affirmative duty to provide reasonable accommodations to disabled employees to enable them to perform the essential functions of the position.

An employer's duty to provide such accommodation is only limited by establishing that the accommodation would impose undue hardship. 42 U.S.C. § 12112(b)(5)(a); ORS 659.436(2)(e).

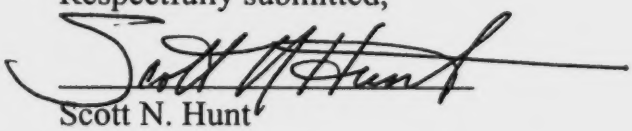
When the claim involves whether an employer has reasonably accommodated a disabled individual, the claim is not one for disparate treatment. Rather the claim alleges that the employer has failed to meet its statutory duty of providing reasonable accommodation. As reasonable accommodation involves an objective, affirmative duty, the concept of pretext is simply inapplicable to the analysis. Therefore, a pretext analysis should not be utilized on disability discrimination claims involving an employer's failure to provide reasonable accommodation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

DATED this 3rd day of July, 2001.

Respectfully submitted,



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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMILY SNEAD, Plaintiff-Appellant, v. METROPOLITAN PROPERTY AND CASUALTY INSURANCE CO., a Rhode Island corporation, and JAMES MCINTOSH, Defendants-Appellees.	No. 99-35071 DC No.98-163-GMK **OPINION**

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted
May 4, 2000--Portland, Oregon

Filed January 23, 2001

Before: Donald P. Lay,* A. Wallace Tashima, and
M. Margaret McKeown, Circuit Judges.

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*The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Opinion by Judge Tashima; Dissent by Judge Lay

COUNSEL

Scott N. Hunt, Esq., Busse & Hunt, Portland, Oregon, for the plaintiff-appellant.

Andrew M. Altschul, Esq., Stoel Rives, Portland, Oregon, for the defendants-appellees.

OPINION

TASHIMA, Circuit Judge:

The underlying question we must decide in this employment discrimination case arising under Oregon law is whether plaintiff Emily Snead ("Snead") adduced sufficient evidence to survive her employer's, Metropolitan Property and Casualty Insurance Company's ("Met"), motion for summary judgment. We must first decide, however, the threshold question of whether this action is governed by Oregon's special summary judgment procedure applicable to employment discrimination cases or by federal summary judgment rules and procedures.

I. BACKGROUND

Met is engaged in the sale of home and auto insurance through agents known as Property and Casualty Specialists ("PCS"). These agents, in turn, report to Market Development Managers ("MDM"). Each MDM is responsible for managing 15 to 20 PCS agents. In the Portland market, Met originally hired two MDMs: Snead and Bill Todd. Both reported to James McIntosh, Vice President of the PCS organization.

While Snead handled the "Portland North" territory, Todd was assigned to the "Portland South" territory. By 1993, Snead and Todd together managed 33 PCS agents.

In early 1995, Snead was being stalked by one of Met's former employees. She claimed that through the use of the mail and telephone, that former employee harassed and threatened her. She also claims that Met handled the matter poorly, offered little help, and even made light of the situation.[2] As a result, she claimed that she suffered emotional distress, which was diagnosed as "Post-Traumatic Stress Disorder and Depression."

After being so diagnosed, Snead sought and was granted a three-month leave of absence, which included a salary continuation under Met's short-term disability program. Snead ultimately extended her request to six months, which was also approved. When Met received Snead's request for an

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[2]It is undisputed, however, that Met paid to have caller ID installed on her office telephone, installed a security system in her office, paid a bodyguard, and allowed her to bring a concealed handgun to work. Also, once the stalker was identified as a former employee (David James) whom Snead had terminated, Met not only paid for Snead's defense in a lawsuit brought by James against Met and Snead, but also paid to prosecute Snead's counterclaim, which resulted in a restraining order against James and a money settlement to Snead. Coincidentally, the James lawsuit was settled exactly as Snead began her disability leave in March 1995. Nevertheless, Snead filed a lawsuit against Met in September 1995, claiming intentional infliction of severe emotional distress and reckless infliction of emotional distress. Snead alleged that Met failed to take appropriate action in response to the stalking and death threats that she suffered. The district court dismissed Snead's suit against Met, which was affirmed by the Ninth Circuit. *See Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 909 F. Supp. 775 (D. Or. 1996), *aff'd*, 116 F.3d 486 (9th Cir. 1997) (Table), 1997 WL 345606.

extension, Todd was assigned responsibility for Snead's territory. For administrative convenience, this change was reflected on paper by combining Portland North and Portland South into one market. Although Gary Max, a PCS employee, filled in for Snead, no one was ever hired to replace Snead.

After her short-term disability leave expired, Snead did not return to work. Instead, she went on long-term disability leave. In mid-1996, more than a year after Snead first went on disability leave, Met sent her a letter stating that her long-term disability benefits would end in December 1996, unless she provided medical documentation that she was still disabled. The decision to terminate her long-term disability benefits was partially based on the opinion of Dr. Robert Slack, a Board certified psychiatrist, who opined that, given the stalking incident, "[h]er refusal to return to work is understandable," but that she could still function in other work settings. Snead failed to provide the requested additional information, and thus her disability benefits ended on December 31, 1996. She subsequently faxed McIntosh a medical release stating that she could return to work without any restrictions on February 24, 1997.

Snead expected to be reinstated in her old position. Met's Resources Handbook for Managers states that: "An employee returning from disability will be placed in the job they occupied prior to the disability. An employee returning from a leave of absence may be placed in the same job occupied before the leave of absence or in a reasonably equivalent position at the same salary and rate of pay." But, while Snead was on leave, the staff of Met's Portland office decreased from 33 employees in 1993 to 10 in January 1997. Consequently, Met no longer needed two MDMs in the Portland market (or in any market in the United States). As a result, in mid-January 1997, McIntosh called Snead to tell her that her MDM position no longer existed and to discuss her

future in the company. Snead and McIntosh disagree about what was said in that conversation. According to Snead, they discussed the possibility that Snead could be moved to another job (local or otherwise), but that she needed specifics about the job and the compensation. On the other hand, McIntosh testified that Snead indicated to him that she was not mobile and did not want to be a PCS agent.

On January 21, 1997, McIntosh sent Michael Dineen, a Human Resources representative, an e-mail about his conversation with Snead, stating:

> I told her that the PCS program has undergone major changes and that there is not a MDM position available in Portland at this time. I did inform her that there might be a MDM position in another market and asked her if she is mobile. She informed me that she is not. She also has no intentions of becoming a PCS. She basically expected a comparable position at the same salary rate, with bonuses, AND be able to work out of her home. I again stated that we have no desire to grow the market to require additional management.[3]

McIntosh and Bill Moore, Vice President of Sales, also discussed Snead's position and the need to eliminate one of the Portland MDMs. According to Snead, however, this was the first time that McIntosh discussed that need with Moore (his superior) who until the time of Snead's call, had expected her to return to her old position.[4] Nonetheless, Moore agreed with

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[3]Snead testified that following their various conversations, McIntosh never gave her the specific information she requested regarding other positions and that he seemed "disinterested." She also testified that Dineen was "condescending" and "demeaning."

[4]Yet, in a March 21, 1997, letter, Met's counsel stated that "the decision [to eliminate Snead's position] was made in July 1995,

McIntosh's decision to reduce the number of MDMs in the Portland market.

On February 14, 1997, McIntosh wrote to Snead to confirm their earlier conversation and to confirm that the position that she held as MDM was determined to be "excess."[5] The letter stated that Snead could explore a PCS agent position supervised by Todd. Snead would be paid an unspecified "base salary as well as commission." McIntosh's letter also stated that as of February 24, 1997, her status as an "excess employee" made her eligible for "an enhanced separation allowance."[6] Snead's attorney responded on February 20, 1997, stating that Snead was not interested in a demotion to a PCS agent position. Consequently, on March 19, 1997, the Director of Human Resources wrote to Snead to inform her that her discontinuance would be processed effective March 31, 1997, unless Snead communicated to Met that she was interested in a PCS agent position or in relocating. Pending a response, the Human Resources Department drafted a "Job Related Turnaround Document" on March 19, 1997, listing March 31 as the effective date of Snead's termination.

On March 31, 1997, Snead's attorney requested further information regarding the specifics of the PCS agent position.

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while Ms. Snead was on long term disability leave, to manage the Portland market with only one MDM." Although this representation somewhat contradicts Moore's statements, it is consistent with the administrative change that combined the Portland North and Portland South territories into one market.

[5]"Excess" is Met's internal term indicating that the position would be eliminated.

[6]The district court noted that"[o]n February 24, 1997, Met put Snead back on its payroll while discussions continued about possible positions."

Upon receipt of the request for information, however, Met's attorney stated that "[b]y the time [he] received [Snead's attorney's] letter of March 31, 1997 it was too late to forward it to [Met] for receipt the same day." Accordingly, Snead's termination took place as scheduled on March 31, 1997. Less than two months later, Met wrote Todd and all the PCS agents in Portland to inform them that they would be laid off as the result of a decision to close the Portland office. Met ultimately terminated Todd in August 1997. There is still one PCS agent in Portland who reports to a MDM in Seattle.

As a result of her termination, Snead commenced this state law disability discrimination case in Oregon state court, claiming violation of § 659.436 of the Oregon Revised Statutes. The case was timely removed to federal court on the basis of diversity of citizenship jurisdiction. The district court granted defendants' motion for summary judgment because Snead failed to establish that she was terminated because of her disability. Snead timely appeals from the judgment. We have jurisdiction under 28 U.S.C. S 1291, and we affirm.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir. 2000). In so doing, we apply the same standard used by the district court under Federal Rule of Civil Procedure 56(c)--namely, viewing the evidence in the light most favorable to the non-moving party, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

III. DISCUSSION

A. The Prima Facie Case

[1] Section 659.436 provides that"[i]t is an unlawful employment practice for any employer to . . . discharge from employment . . . an otherwise qualified person [because such person] is a disabled person." Or. Rev. Stat. § 659.436 (1999). The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law. *See Henderson v. Jantzen, Inc.*, 719 P.2d 1322, 1323-24 (Or. Ct. App. 1986); *see also* Or. Rev. Stat. § 659.449 (providing that Oregon's discrimination laws "shall be construed to the extent possible in a manner that is consistent with any similar provision of the federal Americans with Disabilities Act of 1990 [`ADA'], as amended"). Snead alleges that she was terminated because of her disability. Therefore, to establish a prima facie case of discrimination under the ADA she must show that she: (1) is disabled; (2) is qualified; and (3) suffered an adverse employment action because of her disability. *See Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996). It is undisputed that Snead was qualified for the job. What is disputed, however, is whether she was disabled and whether she was terminated because of her disability.[7]

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[7]We are puzzled by the dissent's insistence that this is a reasonable accommodation/interactive process case despite its recognition that "Snead did not ask Met to alter her job in a way that would accommodate her disability. Snead was prepared to return to her MDM position without any modifications to the job as it was before she went on leave. In other words, she simply asked Met for her old job back. " Slip op. at 1012. As we recently noted in *Barnett v. U.S. Air, Inc.* , 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), "[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation." Here, neither

1. Disability

[2] Under Oregon law, a "disabled person" is defined as a person who: (1) "has a physical or mental impairment which substantially limits one or more major life activities;" (2) "has a record of such an impairment;" or (3) "is regarded as having such an impairment." Or. Rev. Stat. § 659.400(1).

a. Physical or Mental Impairment

Under the Oregon regulations, "physical and mental impairments" include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Or. Admin. R. 839-006-0205(3) (2000). Within the statutory scheme, "substantially limits" means that"[t]he impairment renders the person unable to perform a major life activity that the average person in the general population can perform."[8] Or. Rev. Stat. § 659.400(2)(d)(A). The definition of "major life activity" includes employment. *Id.* § 659.400(2)(a).

[3] In Oregon, stress and depression can be considered mental impairments. *See Wheeler v. Marathon Printing, Inc.*, 974 P.2d 207, 212-13 (Or. Ct. App. 1998). The same is true under the ADA. In *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 365 n.3 (9th Cir. 1996), this court explained that "stress and depression could be covered by the ADA. An EEOC

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party has raised reasonable accommodation as an issue and both have treated this as a disparate treatment case.

[8]A second definition of "substantially limits" is that "[t]he impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity." Or. Rev. Stat. § 659.400(2)(d)(B).

Technical Assistance Manual on the ADA provides that "`stress" and "depression" are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder.' " *Id.* (quoting EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act S 2.1(a)(i), at II-3 (1992)); *see Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1174-75 (9th Cir. 1998) (per curiam) (finding that plaintiff could be substantially limited in his ability to work because he suffered from depression, post-traumatic stress disorder, and panic attacks).[9]

[4] In the case at bench, the evidence relating to Snead's condition is sufficient to raise an issue of fact that she suffered from a documented physiological or mental disorder. First, her own physician wrote that her stress and depression rendered her "medically" disabled. Furthermore, an independent medical examiner, Dr. Charles Bellville, found that Snead suffered from "Post-Traumatic Stress Disorder and Depression."

b. Substantially Limiting

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[9]At least four other circuits agree that depression can constitute a mental impairment under the ADA. *See Krocka v. City of Chicago*, 203 F.3d 507, 512 (7th Cir. 2000) ("Because [employee's] severe depression is a medical condition diagnosed by a health professional, it qualifies as an impairment under the ADA."); *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) ("depression and anxiety compounded by Attention Deficit Disorder substantially limited plaintiff's ability to work"); *Prichard v. Southern Co. Servs.*, 92 F.3d 1130, 1132 (11th Cir. 1996) ("[d]epression has been held to constitute a mental impairment"); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1408 (5th Cir. 1983) (same).

[5] Because we conclude that Snead has raised an issue of fact as to whether she has a recognized impairment, we now examine the extent to which it was substantially limiting. The Oregon Court of Appeals has stated that its "opinion in *Quinn [v. Southern Pac. Transp. Co.*, 711 P.2d 139 (Or. Ct. App. 1985)] makes it clear that `employment,' as used in [Or. Rev. Stat. §] 659.400(2)(a), does not mean employment in general." *Winnett v. City of Portland*, 847 P.2d 902, 907 (Or. Ct. App. 1993) (" `A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger.'" (quoting *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980)). The court also rejected, however, the notion that " `employment' meant . . . `the employment of one's choice with [a particular employer].' " Id. (quoting E.E. Black, 497 F. Supp. at 1099). Rather, the court chose a sensible compromise and found that an impairment is substantially limiting if it substantially limits the performance of the work involved. See *id.* ("We are . . . persuaded that the meaning of the term `employment' in [Or. Rev. Stat. §] 659.400(2)(a) is not at either end of the spectrum."). Here, the work involved is that of sales manager.

[6] Snead has at least raised a genuine issue of material fact that she was limited in her ability to perform the work involved. Her doctor wrote that she needed leave because she was "medically disabled by stress and depression," not that she was limited only from doing her MDM job at Met. Further, Snead's leave of absence was not temporary, and it even had to be extended. As a result, she did not work at all for nearly two years. *Cf. Hardie v. Legacy Health Sys.*, 6 P.3d 531, 540 (Or. Ct. App. 2000) (" `Short term physical or mental impairments leaving no residual disability or impairment are not disabilities.' ") (quoting Or. Admin. R. 839-06-240(1) (1996))).

It is not fatal that Dr. Robert Slack, a Board certified psychiatrist, opined that, given the stalking incident,"[h]er refusal to return to work is understandable," but that she could still function in other work settings. Even if Snead could return to work two years into her recovery, the record still shows that she had been "medically disabled" and had even been suicidal. Therefore, there is a genuine issue of fact about whether Snead's mental condition had prevented her from working as a sales manager, at least while she was on disability leave. *See* Or. Rev. Stat. § 659.400(2)(d)(A).

c. Record of Impairment

[7] Under Oregon law, Snead would have "a record of such impairment" if she "has a history of . . . such an impairment." *Marconi v. Guaradian Mgmt. Corp.*, 945 P.2d 86, 89 n.1 (Or. Ct. Ap. 1997) (quoting Or. Rev. Stat. § 659.400(2)(b)). The ADA definition is virtually identical. See 29 C.F.R. § 1630.2(k) (2000) (stating that a person has a record of an impairment if that person "has a history of . . . a mental or physical impairment that substantially limits one or more major life activities"); *see Burch v. Coca-Cola Co.*, 119 F.3d 305, 321 (5th Cir. 1997). The many physicians' notes and various letters in the record, combined with Snead's prolonged leave, create at least a genuine issue of fact regarding a record of Snead's impairment. *See Prichard*, 92 F.3d at 1134 (paid and unpaid disability leave establish evidence of a record of being impaired). In conclusion, the evidence shows that Snead has established a genuine issue of material fact that she has a record of disability--and thus is considered disabled under § 659.400. Therefore, under Oregon law, it is not necessary for Snead to also establish either that she is currently impaired or that she is regarded as having that impairment. *See* Or. Rev. Stat. § 659.400(1).

2. Adverse Employment Action Because of Her

Disability

[8] It is beyond challenge that a person's termination is considered an adverse employment action and defendants do not argue otherwise. What is in dispute, however, is whether that adverse action was taken *because* of Snead's disability. In Oregon, "[e]vidence that permits an inference of discrimination" is sufficient for a plaintiff to make a prima facie case that she was discriminated against because of her disability. *See Henderson*, 719 P.2d at 1324.

[9] Here, Snead has met her burden of providing evidence which "permits an inference of discrimination. " *Id.* Although not strong evidence, conflicting information regarding the timing of the need to eliminate Snead's position creates an inference that her disability may have been a factor in Met's decision. According to McIntosh, when he spoke to Snead in January 1997, he told her that there was no MDM position available in Portland. Yet, when Moore was asked if it had been his intention up until the point of Snead's call to return her to her old position, he answered that it had been. Further, a March 21, 1997, letter from Met's attorney to Snead's attorney, states that "the decision [to eliminate Snead's position] was made in July 1995, while Ms. Snead was on long term disability leave, to manage the Portland market with only one MDM"--thereby contradicting Moore's testimony. In conclusion, the timing of Snead's termination, coupled with her disability history and her communications with Met, provide sufficient evidence to raise a genuine issue of material fact as to the third element of her prima facie case of discrimination.

Snead would have us end our analysis at this point. She argues that Met was not entitled to summary judgment because, in order to defeat a defendant's motion for summary judgment, Oregon summary judgment law in employment cases requires only that an employee/plaintiff adduce a prima facie case of discrimination. *See Henderson*, 719 P.2d at 1324;

Callan v. Confederation of Or. Sch. Adm'rs, 717 P.2d 1252, 1254 n.3 (Ct. App. Or. 1986). Met, on the other hand, argues that this court should follow the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Which rule we apply depends on the nature of the federal rule.

B. Beyond the Prima Facie Case: Burden-Shifting

1. Federal Procedural Law Governs

[10] "Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996). Thus, "[u]nder the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Id.* at 427; *see Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As stated by the Supreme court, however, "[c]lassification of a law as `substantive' or `procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini*, 518 U.S. at 427. This is one of those times.

[11] We are not without guidance, however. In order to assist us in this endeavor, the Supreme Court has "propounded an `outcome determination' test." *Id.* Under that test, we first ask the following question: " `[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?' " *Id.* (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)). Additionally, whether such disregard would affect the outcome of an action "must be guided by `the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.' " *Gasperini*, 518 U.S.

at 428 (1996) (quoting *Hanna*, 380 U.S. at 468). Accordingly, we should not apply this test so as to "produce a decision favoring application of the state rule unless one of these aims will be furthered." *Chamberlain v. Giampapa*, 210 F.3d 154, 159 (3rd Cir. 2000).

Guided by these principles, we address the question whether Oregon's "prima facie only" rule is outcome determinative in this sense: "Would `application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum state, or] be likely to cause a plaintiff to choose the federal court'?" *Gasperini*, 518 U.S. at 428 (*quoting* Hanna, 380 U.S. at 468 n. 9) (alterations in the original). If the state law is indeed outcome determinative in light of these aims, we must then decide whether an overriding federal interest justifies application of federal law. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-39 (1958).[10]

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[10]No circuit has squarely decided whether a state's application of an alternative to the *McDonnell Douglas* burden-shifting scheme is "procedural" or "substantive" under the *Erie* doctrine. *See Bourbon v. K-Mart Corp.*, 223 F.3d 469, 474 (7th Cir. 2000) (Posner, J., concurring). This is so because, in most cases, the evidentiary scheme at summary judgment is identical under both state and federal law. *See, e.g., Perry v. Woodward*, 199 F.3d 1126, 1141-42 (10th Cir. 1999) (New Mexico); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999) (New York); *Carpenter v. Federal Nat'l Mortgage Ass'n*, 165 F.3d 69, 72 (D.C. Cir. 1999) (District of Columbia); *Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir. 1999) (Massachusetts); *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 198 (4th Cir. 1998) (West Virginia); *Lee v. Minnesota, Dep't of Commerce*, 157 F.3d 1130, 1133 (8th Cir. 1998) (Minnesota); *Nichols v. Lewis Grocer*, 138 F.3d 563, 565-66 (5th Cir. 1998) (Louisiana); *Olson v. General Elec. Astrospace*, 101 F.3d

a. The Oregon Rule Is Not Outcome Determinative

[12] Utilization of the Oregon summary judgment rule--as opposed to the three-part *McDonnell Douglas* analysis--is not outcome determinative. The only significant difference between the state and federal regimes is when a case that fails one of the *McDonnell Douglas* components will be dismissed. For example, a plaintiff whose case could not survive summary judgment on the third *McDonnell Douglas* component in federal court for lack of evidence would only delay the inevitable by proceeding in state court where, on the same record, a nonsuit or JNOV would be in order at the close of the plaintiff's case. In either case, the court would ultimately apply the same substantive law, employ the same reasoning, and produce the same result. Only the timing of the case's dismissal (along with the added expense of bringing the case to trial) would differ.

[13] Furthermore, the application of the Oregon scheme in such cases would not further either of *Erie's* twin aims: discouragement of forum-shopping and avoidance of inequitable administration of the laws. *See Gasperini*, 518 U.S. at 428. Although one could speculate, for example, that filing in an Oregon court may be advantageous to employment discrimination plaintiffs because a higher percentage of such claims would go to trial, neither of the "twins aims of *Erie*" is truly implicated. *Hanna*, 380 U.S. at 468. The identical outcomes produced through the state and federal systems make it improbable that increased forum-shopping will occur.

947, 956 (3d Cir. 1996) (New Jersey); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 n.8 (6th Cir. 1994) (Kentucky)). *But see, Bourbon*, 223 F.3d at 474 (Posner, J., concurring) ("Illinois expressly rejected application of the *McDonnell Douglas* to Illinois retaliatory discharge cases").

Likewise, because no significant advantage would ultimately be gained by filing in state, as opposed to federal court, it is unlikely that litigants will encounter significantly different results under the two regimes. Therefore, we conclude that, in light of *Erie's* twin aims, application of the Oregon summary judgment rule in employment discrimination cases would not be outcome determinative if applied by federal courts sitting in diversity.

b. Overriding Federal Interests

Additionally, overriding federal interests require application of federal law in this case. *See Byrd*, 356 U.S. at 537. Making a prima facie showing of employment discrimination is not an onerous burden. *See McDonnell Douglas*, 411 U.S. at 802; *Chuang v. University of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000) ("The requisite degree of proof necessary to establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence.") (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994))). If federal courts sitting in diversity were compelled to follow *Callan* and *Henderson*, nearly every case of employment discrimination filed under Oregon law would go to trial, providing an increased burden on the district courts' already crowded trial dockets. This burden is too high a price to pay for an outcome that would be identical if all three *McDonnell Douglas* components were applied at the summary judgment stage rather than at trial.

Furthermore, "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury." *Byrd*, 356 U.S. at 537. The policy of uniform enforcement of

state-created rights and obligations "cannot in every case exact compliance with a state rule--not bound up with rights and obligations--which disrupts the federal system of allocating functions between judge and jury." *Id.* at 537-38.

c. Other Considerations

Our conclusion that the McDonnell Douglas burden-shifting scheme is federal procedural law comports with the Supreme Court's own pronouncements. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 521 (1993), the Court stated that "the *McDonnell Douglas* presumption is a procedural device, designed only to establish an order of proof and production." *Id.* (emphasis in the original). Although this statement was not essential to the Court's ultimate decision, it is probative of the Court's view on this subject. The Court has reiterated such view in at least one subsequent case. In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), the Court stated that "*McDonnell Douglas* and subsequent decisions have `established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases.' " *Id.* at 2106 (quoting *St. Mary's*, 509 U.S. at 506) (ellipsis in the original).

Snead, however, argues that our decision in *Messick v. Horizon Industries Inc.*, 62 F.3d 1227 (9th Cir. 1995), mandates the application of the Oregon rule. In *Messick*, we were asked to resolve whether summary judgment should be granted to the defendants on federal and Oregon discrimination claims. *Id.* at 1229. After holding that a grant of summary judgment for the defendants on the plaintiff's federal claim was erroneous because the plaintiff had presented sufficient evidence to raise an issue of fact as to her prima facie case and as to pretext, we recognized that Oregon law only required a plaintiff to adduce evidence of a prima facie case in order to defeat summary judgment. See *id.* at 1232.

Therefore, without further analysis, we indicated that because the plaintiff "established a prima facie case of discrimination [on the federal claim], summary judgment on the Oregon Age Discrimination Act claim was also inappropriate. " *Id.*

This language does not, however, bind us here. In *Messick*, we never analyzed application of the Oregon rule in federal court. Rather, as stated above, we assumed it did, and because we had previously found an issue of fact as to pretext on the federal claim, we did not engage in a separate analysis under state law. *See id.* In short, because, by deciding the summary judgment motion on the federal claim in the plaintiff's favor, we also necessarily decided the state claim in the same way, any discussion regarding application of Oregon's summary judgment law to the plaintiff's state law claim was dicta--the issue had already been decided. Further, "this Court has never considered itself bound [by prior sub silentio holdings] when a subsequent case finally brings the . . . issue before us." *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363 (9th Cir. 1998) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 n.4 (1989) (brackets in the original; ellipsis added) (internal quotation marks omitted)). This is such a subsequent case. Until now, the question of whether we should apply the *McDonnell Douglas* burden-shifting scheme to state law claims was an open question. Accordingly, we need not follow *Messick's* assumption.

Our conclusion is also consistent with circuit law on the application of federal summary judgment procedures in diversity cases. *See Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir. 1994) ("In diversity cases, procedural issues related to summary judgment are controlled by federal law."); *Caesar Elec. Inc. v. Andrews*, 905 F.2d 287, 289 n.3 (9th Cir. 1990) ("under the Erie doctrine, federal law governs the procedural aspects of summary judgment in a

diversity case"); *cf. Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 530-32 (9th Cir. 2000) (holding, in a diversity case, that district court did not err in reconsidering state court's denial of summary judgment before removal, which was contended to be law of the case, because "the California summary judgment standard under [Cal. Civ. Proc. Code] § 437c is different in relevant respects from the standard under Fed. R. Civ. P. 56" and necessarily assuming that federal rule applied after removal). We must, therefore, examine the evidence tendered on summary judgment beyond the prima facie case in accordance with *McDonnell Douglas'* burden-shifting model.

2. Pretext Analysis

Under the ADA, when an employee establishes a prima facie case of discrimination because of a disability, and the employer provides a non-discriminatory reason for that discharge which "disclaims any reliance on the employee's disability in having taken the employment action,"[11] the analysis developed in *McDonnell Douglas* for suits under Title VII of the Civil Rights Act of 1964 applies.[12] *Mustafa*, 157 F.3d at 1175-76 (citing *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 514-16 (2d Cir. 1991)).

[14] Here, Met has unqualifiedly stated that Snead's condition had nothing to do with Met's elimination of her

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[11]On the other hand, if the employer acknowledges reliance on the disability in the employment decision, the employer bears the burden of showing that the disability is relevant to the job's requirements. *Mustafa*, 157 F.3d at 1176.

[12]It is also undisputed that Met provided a legitimate non-discriminatory reason for Snead's termination--namely, the elimination of her position as part of a reduction in force.

position. Thus, under *Mustafa*, Snead "bears the burden at trial of showing that [Met's] reason for . . . termination was pretextual." *Id.* at 1176; *see also Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) ("Unless [plaintiff] can show that [defendant's] explanation for [plaintiff's] discharge was a pretext for disability discrimination, [she has] . . . presented no triable issue under the ADA."); *Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990) (holding that once the employer offers a legitimate, nondiscriminatory reason for the discharge, and that reason disclaims any reliance on the disability, the burden shifts to the employee to demonstrate that the articulated reason is a pretext for disability discrimination). Therefore, on summary judgment, we must determine whether Snead provided sufficient evidence to support a finding of pretext. In so doing, the plaintiff retains the burden of persuasion. In other words,

> she now . . . ha[s] the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (*citing McDonnell Douglas*, 411 U.S. at 804-05).

"These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext so as to make summary judgment improper." *Chuang*, 225 F.3d at 1127. Furthermore, in making such showing, Snead does not necessarily have to introduce additional, independent evidence of discrimination. *See Reeves*, 120 S.Ct. at 2109; *Chuang*, 225 F.3d at 1127."As the

Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting h[er] prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Id.* (citing *Reeves*, 120 S.Ct. at 2108).

[15] Although Snead has provided sufficient evidence to support an inference of discrimination, and thus has met her burden on her prima facie case, that evidence is not sufficient to raise a genuine issue of material fact regarding the truth of Met's proffered nondiscriminatory reasons or that a discriminatory reason more likely motivated Met to eliminate her position. *See Burdine*, 450 U.S. at 256. On the contrary, the evidence presented by Snead reinforces Met's proffered justification. For example, Snead's evidence shows that less than two months after Snead's position was eliminated, the other Portland MDM position was also eliminated. This evidence confirms that Met's business decision to reduce its work force in Oregon was independent of Snead's disability. This evidence also shows that at least one other similarly situated employee (Todd) was treated in a similar manner as Snead, thereby negating any showing of pretext. In light of this evidence, although it is true, as we have noted above, that there are some inconsistencies in Met's statements as to the timing of its decision to eliminate Snead's MDM position, those inconsistencies are not so great as to show that Met's reason was pretextual. Consequently, Snead has failed to raise a genuine issue of material fact that Met's legitimate, nondiscriminatory reason for her termination was pretextual.

C. Action Against Employee

Snead also brought a claim against McIntosh for violation of § 659.030(1)(g) which makes it unlawful for "any person, whether an employer or an employee to aid, abet,

incite, compel or coerce the doing of any of the acts forbidden under . . . [Or. Rev. Stat. §§] 659.400 to 659.5454 or to attempt to do so." Because Snead failed to raise a genuine issue of material fact that Met's legitimate, nondiscriminatory reason for her termination was pretextual, her "aiding and abetting" claim against McIntosh also fails.

IV. CONCLUSION

We hold that when entertaining motions for summary judgment in employment discrimination cases arising under state law, federal courts sitting in diversity must apply the *McDonnell Douglas* burden-shifting scheme as a federal procedural rule. Applying that scheme here, we conclude that, although she has made out a prima facie case, Snead has failed to raise a genuine issue of material fact that Met's reason for her termination was pretextual. Accordingly, we affirm the district court's grant of summary judgment in favor of defendants.

AFFIRMED.

LAY, Circuit Judge, Dissenting:

I respectfully dissent. The issue before us is one interpreting the Oregon disability statute. The Oregon law is to "be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act."[1] Or. Rev. Stat. § 659.449. However, the

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[1]Notably, the statutory language of the Oregon law is phrased much differently than that of the ADA. The Oregon law states that "[i]t is an unlawful employment practice for any employer to . .. discharge from employment . . . an otherwise qualified person

Oregon appellate courts specifically reject the federal burden-shifting scheme applied by the majority in this case.[2] *See Henderson v. Jantzen, Inc.*, 719 P.2d 1322, 1323-24 (Or. Ct. App. 1986). ("A plaintiff's prima facie case [for employment discrimination] does not disappear merely because a defendant asserts a nondiscriminatory reason which

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[because such person] is a disabled person." Or. Rev. Stat. § 659.436(1) (1999). The ADA states that an employer "shall [not] discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees." 42 U.S.C. § 12112(a).

[2]The *McDonnell Douglas* burden-shifting analysis applied by the majority was fashioned by the Supreme Court to analyze claims brought under Title VII of the Civil Rights Act of 1964. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). The Court has explained that "[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court . . . to[the] ultimate question [of whether the defendant intentionally discriminated against the plaintiff]" in violation of Title VII. *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Accordingly, once a plaintiff makes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its allegedly discriminatory actions. *McDonnell Douglas*, 411 U.S. at 802. If the employer does so, the prima facie case disappears and the employee must then show that the employer's proffered reasons were pretext for discrimination. *See id.* at 804.

In contrast, the ADA was designed "to provide clear, strong, consistent, enforceable standards" to eliminate discrimination against disabled individuals. 42 U.S.C. § 12101(b)(2). As such, unless disparate treatment with others similarly situated is alleged, there is no statutory avenue under the ADA for an employer to articulate a nondiscriminatory reason for its actions or for an employee to show that the employer's reason was pretextual.

may or may not persuade the trier of fact."). Because the two statutes are different, this case does not present an issue of whether the state or federal burden of proof should be applied. It seems axiomatic that in applying the Oregon statute we need to apply Oregon law which interprets that statute. In other words, it is incongruous for a federal court to dismiss a prima facie case made under the Oregon disability statute based on a burden of proof paradigm designed for disparate treatment cases broughtunder a totally different statutory scheme. *See Bultemeyer v.Fort Wayne Cmty. Schls.*, 100 F.3d 1281, 1283-84 (7th Cir. 1996). *Erie* and *Byrd* both teach us that we simply exchange courtrooms, not law, in deciding diversity cases. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). In this case, I am not aware of any federal policy such as those discussed in the majority opinion which should override application of the Oregon law in a diversity case.

Furthermore, applying *McDonnell Douglas* principles to the facts of this case seems to be a complete non sequitur. This is not a disparate treatment case of the sort which the *McDonnell Douglas* burden of proof is designed to govern. Snead does not contend that other employees who were similarly situated were treated more favorably than her. Snead simply claims that she has a disability but is still qualified to work with or without accommodation.

Thus, even if the Oregon law parallels the ADA, the facts of this case do not fit within the *McDonnell Douglas* framework. Rather, the language of the ADA sets the threshold Snead must meet in order to defeat summary judgment. Snead must establish that (1) she is disabled; (2) she is qualified to perform the essential functions of the job, either with or without accommodation; and (3) she was terminated by reason of her disability. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1121 (9th Cir. 2000) (en banc). If the employee cannot show a

genuine issue of material fact on any of the three prongs, summary judgment is appropriate.

As for the first prong, I agree with that part of the majority's opinion that finds there is a genuine issue of disputed fact as to whether Snead is disabled.

The second prong of Snead's prima facie case requires a two-part showing. First, Snead must demonstrate that she meets the necessary prerequisites for the job. See 42 U.S.C. § 12111(8); 29 C.F.R. S 1630.2(m); *cf.* Or. Rev. Stat. § 659.436(2)(e). Met concedes that Snead is qualified to perform the essential functions of the MDM position that she held prior to her leave of absence. Next, Snead must show that she can perform the essential functions of the job with or without reasonable accommodation. See 42 U.S.C. § 12111(8); 29 C.F.R. S 1630.2(m); *cf.* Or. Rev. Stat. § 659.436(2)(e). Unlike many ADA claimants, Snead did not ask Met to alter her job in a way that would accommodate her disability. Snead was prepared to return to her MDM position without any modifications to the job as it was before she went on leave. In other words, she simply asked Met for her old job back. At this point she has shown that she is qualified to perform the essential functions of the MDM position with or without accommodation.

However, by the time Snead was prepared to return to work, Met had for business reasons eliminated her former MDM position and thus, could not restore her to that job. The court will not interfere with Met's business judgment to institute a reduction-in-force unless that action runs afoul of the law. *See National Labor Relations Bd. v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964). Yet this fact in itself is not fatal to Snead's ability to establish a causal link between her disability and Met's actions. Snead does not claim a right to the particular MDM position she formerly held, nor could she under either federal or Oregon law. *See Thompson v. Holy*

Family Hosp., 121 F.3d 537, 540 (9th Cir. 1997); *Winnett v. City of Portland*, 847 P.2d 902, 907 (Or. Ct. App. 1993). But assuming Snead can prove that she was disabled, before Met can terminate her it must try to provide other reasonable accommodation or employment opportunities. Met did just that by presenting Snead with three options. First, it offered her continued employment out of the Seattle office, albeit at a lesser position than the one she previously held. Second, Met offered a similar MDM position at a different geographic location. Finally, because her former position had been eliminated from the company, Met offered Snead a severance package. In the end, Met terminated Snead when her request for further information about these alternatives arrived too late. That excuse belies Met's sincerity in offering Snead continued employment with the company.[3]

Assuming that the Oregon disability statute, like the ADA, recognizes the need for parties to engage in a good-faith interactive process to arrive at a reasonable accommodation, then it seems to me there is a gap in the majority's analysis that still leaves this matter unresolved.[4] As this court has held,

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[3]"A few hours' tardiness should not be the reason for cutting off the interactive process and cutting off a person's rights under the ADA." *Bultemeyer*, 100 F.3d at 1286.

[4]An employer commits unlawful discrimination under the ADA if the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless[the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112(b)(5)(A); cf. Or. Rev. Stat. § 659.436(2)(e). The ADA's regulations state that: "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the

"[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation." *Barnett*, 228 F.3d at 1112. The interactive process is mandatory at this point and requires "good-faith exploration of possible accommodations between employers and individual employees." *See id.* at 1114. It is then the employer's burden to show that a proposed accommodation will cause undue hardship. *See id.* at 1113. Thus, in light of Snead's proof and Met's offer of accommodation, there is still missing a good-faith interactive process which should be available to both parties to attempt to resolve any differences. "Under the foregoing analysis, the issue of pretext, which is addressed by the *McDonnell Douglas* framework, is subsumed by the issue of reasonable accommodation. Once a party shows she suffers from a disability but is qualified to carry on work with or without accommodation, the issue becomes whether the employer has entered into a good-faith interactive process to find a reasonable accommodation. The question is whether the accommodation is reasonable and will not cause the employer undue hardship. Pretext should never be an issue in an ADA analysis. Pretext relates to an employer's subjective motivation. Reasonable accommodation relates to an objective analysis of whether other jobs are available which the employee is qualified to do.

[employee] with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). *See also Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 156-165 (3d Cir. 1999).

Nevertheless, the elimination of Snead's job, for whatever reason, does not preclude further inquiry under the ADA. To survive summary judgment Snead must demonstrate a genuine issue of material fact as to whether the parties engaged in a good-faith interactive process aimed at reasonable accommodation. If no other jobs exist, then the inquiry ends because it is impossible under the circumstances for an employer to accommodate the employee. An employer is not required to undertake undue hardship in accommodating a disabled employee. *See* 42 U.S.C. § 12111(10); *cf. Kellogg v. Union Pacific R.R. Co.*, _____ F.3d _____, No. 00-1893, 2000 WL 1769656, at *5 (8th Cir. Dec. 4, 2000) (recognizing that under the ADA "an employer is not required to make accommodations that would subvert other, more qualified applicants for the job."); Or. Rev. Stat. § 659.436(2)(e). But that is not the situation here. Met has sought to reasonably accommodate Snead by offering her various alternatives. By its own actions Met has shown that these offers for accommodations do not pose an undue hardship on its business.

Accordingly, I fail to see how the *McDonnell Douglas* framework for disparate treatment cases relates in any way to the facts of the present case. Here, notwithstanding the elimination of Snead's previous position, Met, at least initially, made an effort to accommodate her. There is no issue of pretext lurking in that. The sole issue that remains is whether Met and Snead have engaged in a good-faith interactive process to determine whether reasonable accommodation is feasible. Without the clarification requested by the plaintiff, it seems to me that there exists an evidentiary gap that needs to be filled before this case can be decided.

I would therefore reverse the grant of summary judgment and remand the case to the district court for further proceedings.

FILED April 5, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMILY SNEAD, Plaintiff-Appellant, v. METROPOLITAN PROPERTY AND CASUALTY INSURANCE CO., a Rhode Island corporation, and JAMES MCINTOSH, Defendants-Appellees.	No. 99-35071 DC No.98-163-GMK **ORDER**

Before: LAY,* TASHIMA, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and McKeown vote to deny the petition for rehearing en banc and Judge Lay so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc

*The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

rehearing. Fed.R.App.P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EMILY SNEAD,

Plaintiff,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE CO., a Rhode Island corporation, and JAMES MCINTOSH,

Defendants.

Case No. CV98-163-KI

OPINION

Richard C. Busse
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KING, Judge:

Plaintiff Emily Snead was formerly employed by defendant Metropolitan Property and Casualty Insurance Co. ("Met") and supervised by defendant James McIntosh. Snead alleges that Met failed to reinstate her when she was released to return to work after a disability leave, and ultimately discharged her, because of her record of disability or because it regarded her as having a disability. Before the court is defendants' motion for summary judgment (#14). For the reasons below, the motion is granted.

FACTS

Met sells home and auto insurance. It hired Emily Snead as one of two Market Development Managers ("MDM") in the Portland office in 1989. Snead was assigned to the Portland North territory and the other MDM, Bill Todd, was assigned to the Portland South territory. MDMs manage a sales force of fifteen to twenty Property and Casualty Specialists ("PCS"). By 1993, Snead and Todd were managing a total of 33 PCS agents and reported to James McIntosh, the Vice President of the PCS organization.

On March 6, 1995, McIntosh and Mike Dineen, working in Met's human resources department, met with Snead to discuss the results of a survey of her subordinates which raised concerns about Snead's management style which McIntosh considered serious. During the several hour meeting, Snead yelled, swore, and became very emotional. Dineen asked her whether she could really handle anything if she was under so much stress and crying.

On March 21, 1995, Snead provided Met with a doctor's note stating that she should take a three month leave of absence because she was medically disabled by stress and depression. Snead was diagnosed with post traumatic stress

syndrome and depression resulting from being stalked by a former Met employee. Met granted Snead salary continuation under its short-term disability program. On June 21, 1995, Snead faxed a note to Met stating that her doctor extended her estimated date of return to September 1, 1995. At this point, Todd was assigned responsibility for the Portland South territory during Snead's absence. In September 1995, Snead went on long-term disability leave. In mid-1996, Met sent Snead a letter telling her that the long-term disability benefits would end in December 1996 unless she provided medical documentation that she was still disabled. Snead did not respond. Her disability benefits ended approximately December 31, 1996.

The Met Portland office substantially reduced its personnel during Snead's leave. The number of PCS agents in the combined north and south Portland market decreased from 18 in January 1995, to 15 in January 1996, to 10 in January 1997. By January 1996, no market in the United States had two MDM positions. In January 1997, Met advertised for an Independent Agent management position to be located in Eugene/Springfield or Roseburg. The position was never filled because Met determined that it would not try to increase the Oregon market in this way.

On January 16, 1997, Snead faxed McIntosh a medical release stating that she could return to work without any restrictions on February 24, 1997. Snead then called McIntosh's secretary to see if the fax was received. The secretary told Snead that McIntosh had the information and would call her right back, but McIntosh did not call for two or three days. According to McIntosh, a few days after receiving the fax, he called Snead to tell her that her position no longer existed because of the staff reductions. The two discussed the possibility of Snead taking a PCS position or another position in the organization.

McIntosh sent Dineen an e-mail about his conversation with Snead. It states:

> I told her that the PCS program has undergone major changes and that there is not a MDM position available in Portland at this time. I did inform her that there might be a MDM position in another market and asked her if she is mobile. She informed me that she is not. She also has no intentions of becoming a PCS. She basically expected a comparable position at the same salary rate, with bonuses, AND be able to work out of her home. I again stated that we have no desire to grow the market to require additional management.

Altschul Affidavit, Ex. 2 at 2.

Snead disagrees with McIntosh's memory of their conversation. She states that McIntosh discussed the possibility of a "quasi" PCS position or a position somewhere else in the company. Snead states that she told McIntosh she needed specifics about the job description and pay but that the two did not discuss whether she was willing to relocate.

After McIntosh spoke to Snead, he spoke with Bill Moore about the second MDM position which had never been filled while Snead was on disability leave. McIntosh told Moore that the market had declined in people, the profitability established was questionable, the competitive position was marginal, and two MDMs were not needed. Moore agreed with McIntosh's conclusion and they decided to "excess" the position. Until this discussion, however, Moore had intended to return Snead to her former position as the second MDM. After this decision was made, McIntosh spoke with people at Met to see if other positions were open for which Snead would be qualified.

On February 14, 1997, McIntosh wrote Snead to confirm the earlier conversation. He stated: (1) the Portland North and South territories had been combined so her former job was determined to be excess; (2) Snead would be eligible on February 24, 1997, for a special severance allowance; and (3) Snead might wish to explore a PCS position, reporting to Bill Todd with compensation in the form of a base salary plus commission. On February 20, 1997, Snead's attorney sent Met's attorney a letter stating that Snead was not interested in a demotion to a PCS position.

At approximately this time, Snead called Todd, who told her that he was glad she was returning and that he needed help in fulfilling the role of MDM.

On February 24, 1997, Met put Snead back on its payroll while discussions continued about possible positions. On March 19, 1997, Carolyn McDonald, human resources director at Met, wrote Snead stating that Met understood that Snead was not interested in the PCS position and was not interested in relocating to a market in another part of the country. McDonald asked Snead to let McIntosh know immediately if the understanding was incorrect because no other positions were available in Portland. McDonald also stated that Snead's discontinuance would be processed effective March 31, 1997, and that she would be paid through that date. On March 31, 1997, Snead's attorney faxed Met's attorney a letter asking for clarification on the possibility of an enhanced PCS position with a base salary, an established book of business, and an office in her home or other satellite location. The letter was not immediately forwarded to Met. Met terminated Snead on March 31, 1997.

Met differentiates between leaves of absence, which are unpaid, from disability leaves, which are paid. The company has a Management Guide - Human Resources booklet in which it lists personnel policies. The Guide states that for an unpaid

leave of absence:

> Upon return to work, the employee is reinstated to the same position occupied before the leave of absence or to a reasonably equivalent position at the same salary level and rate of pay.

Busse Affidavit, Ex. 1 at 4. Met also has a Resources Handbook for Managers. It states:

> An employee returning from disability will be placed in the job they occupied prior to the disability. An employee returning from a leave of absence may be placed in the same job occupied before the leave of absence or in a reasonably equivalent position at the same salary rate of pay.

Plaintiff's Concise Statement at 139.

Snead believes that many of McIntosh's actions after her return from disability leave were inappropriate. She believes: (1) McIntosh should have contacted her more quickly after she sent the fax on January 16, 1997; (2) McIntosh was vague and disinterested; (3) McIntosh should not have put her back on the payroll for thirty days, leaving her in limbo, when she was not in a specific job and performed no work; (4) McIntosh did not follow Met policy on return from a disability leave found in the employee handbook; and (5) McIntosh spoke to Snead differently than before she took a disability leave in that he was perfunctory, curt, vague, and disinterested. Snead also believes that in the past, Met has created positions for employees who were having health problems and whose positions were eliminated. She gave an example of an MDM in Kansas City. Snead believes that McIntosh considered her disabled by an inability to manage due to stress because of his unwillingness to reinstate her, his lack of concern, and his cavalier approach to the situation.

Snead admits that Dineen never took any action regarding her employment that she believes was motivated by discrimination ont he basis of disability, but she thinks Dineen treated or regarded her as a disabled person. She bases that conclusion on her observation that Dineen spoke to her in a condescending and derogatory fashion.

Snead believes that Moore regarded her as having the disability of weakness. She bases her believe on his lack of response to her pleas for direction and help concerning the stalking which she raised with him while they were traveling through an airport before she left on leave.

On May 16, 1997, Met wrote Todd and all the PCSs in Portland stating that they would be laid off as a result of a decision to close the Portland office. Met terminated Todd in August 1997. Today, there is one PCS handling the remaining Portland business who reports to an MDM located in Seattle.

Snead states that there were other types of positions within other Met divisions in Oregon for which she was qualified, such as underwriters, claims, life insurance, and independent agents, but she is unaware of any openings in the February or March 1997 time frame to which she could have applied.

Todd states that it would have made good business sense to reinstate Snead as an MDM in Portland because: (1) a second manager would have helped increase sales agents, a company priority; (2) the state was one of the last impacted by negative market conditions; (3) the state was a "friendly" state, from a regulatory standpoint, in which to grow an agency force; and (4) the Portland market was in a position to grow again because Todd was managing a core group of good people, the loss ratio was under control and the market was returning to profitability. Todd also believes that the company could not achieve its goal of "stop[ping] the bleeding," or losing agents, without a local manager in Portland who could

recruit, train, and support the agents locally. He implies that the decision to lay him off was also not a wise business decision.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

DISCUSSION

I. Private Cause of Action under Oregon's Disability Statute.

Oregon's statutory disability discrimination statute was modified by the legislature in 1997.[1] Defendants contend that the modification removed a private right of action from the statute. Snead contends that the modification unintentionally omitted the addition of the new code section to the portion of

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[1]The parties agree that the new version of the statute applies to this action.

the statute concerning remedies. Because of the nature of the error, Snead contends that the court may revise the statute to express the legislative purpose of retaining a private cause of action.

In the previous version of the act, ORS 659.425 prohibited disability discrimination in employment, in public accommodation, by employment agencies, or by labor organizations. Remedies for many types of discrimination were specified in ORS 659.121:

> (1) Any person claiming to be aggrieved by an unlawful employment practice prohibited by ORS 25.363, 399.235, 659.030, 659.035, 659.227, 659.270, 659.295, 659.330, 659.340, 659.410, 659.415, 659.420, 659.425 or 659.470 to 659.494 may file a civil suit in circuit court for injunctive relief and the court may order such other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay. . . .
>
> (2) Any person claiming to be aggrieved by alleged violations of ORS 659.033(1) or (3), 659.295 or 659.400, 659.405, 659.410(1), 659.415 to 659.435 and 659.550 may file a civil action in circuit court to recover compensatory damages or $200, whichever is greater, and punitive damages. . . .

After the 1997 amendment, ORS 659.425 continued to prohibit disability discrimination in public accommodation, by employment agencies, or by labor organizations. The prohibition against employment discrimination was moved to ORS 659.436:

> (1) It is an unlawful employment practice for an employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because an otherwise qualified person is a disabled person.

ORS 659.121 was not amended in 1997 and, thus, the legislature did not add a reference to ORS 659.436. A similar situation occurred in 1979 when the legislature changed an earlier version of the law prohibiting disability discrimination in public accommodations to also prohibit disability discrimination by employment agencies and labor organizations. When making the amendment and renumbering the sections of the act, the legislature failed to renumber the corresponding provisions of the statute granting civil remedies, thus eliminating the remedy for public accommodation discrimination. The court in Bush v. Greyhound Lines, Inc., 295 Or. 619, 669 P.2d 324 (1983), noted that an examination of the legislative history showed that the legislators did not intend to repeal the remedy for public accommodation discrimination, they only meant to provide remedies for employment discrimination. Id. at 622. The court did not elaborate further because the defendant had conceded the argument, but it did note that a similar error had occurred in numbering statute sections in Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960), and the Warren court revised the statute to express the legislative purpose.

Neither party has provided the court with legislative history. The 1997 amendment also added a section stating that ORS 659.436 should be construed to the extent possible in a manner consistent with the federal Americans with Disabilities Act ("ADA"). Although the ADA requires the exhaustion of

administrative remedies, see 42 U.S.C. § 12117(a) (incorporating Title VII procedures), and the state statute does not, the ADA does provide a private right of action. I do not consider the exhaustion requirement to be a significant difference in this context. I conclude that the legislators did not intend to repeal the private right of action for disability discrimination. Accordingly, the motion for summary judgment of this basis is denied.

II. Merits of the Disability Claim

Oregon courts adopted the federal concept of a prima facie case in discrimination cases. Henderson v. Jantzen, Inc., 79 Or.App. 654, 657, 719 P.2d 1322, rev. denied, 302 Or. 35 (1986). To prevail on her claim of disability discrimination, Snead must establish that (1) she has a disability within the meaning of the statute[2]; (2) she is a qualified individual with a disability, namely, that she is capable of performing the essential functions of the job with or without reasonable accommodation; and (3) she was terminated because of her disability. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 271 (9th Cir. 1996). Defendants contend that Snead cannot establish the first and third elements of the prima facie case.

I will first address whether Snead has raised a genuine issue of material fact that her termination was because of her disability.

Defendants contend that Snead was terminated because the reduction in the Met staff servicing the Portland market

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[2]Snead alleges that she is disabled because she has a record of an impairment which substantially limits one or more major life activities or is regarded as having such an impairment. ORS 659.400(1).

eliminated her position and she was unwilling to consider other types of positions or positions in other cities.

Snead contends that Met should have reinstated her to an MDM position in the Portland market. Although she acknowledges that the Portland market had suffered reverses, both she and Todd state that the only way to halt the reversal and accomplish the company's goal of increasing sales agents would be to staff the second MDM position in Portland. It might be true that Snead could have reinvigorated the Portland market, ultimately reestablishing it as a market requiring two MDMs. But Met is under no obligation to channel its resources into this market. There is no evidence that Met did anything except make a business decision to continue to reduce the size of the Portland staff until a single PCS, managed by an MDM in Seattle, was able to handle all of the business. There is no evidence that Snead's return from disability leave influenced this decision or that Met would not have made the decision if Snead had never been out on leave. The most telling evidence is that the other employees, including Todd in the last MDM slot, were told that they would lose their positions within a few months of Met telling Snead that it could not reinstate her as an MDM.

Snead also thinks the company should have acted more appropriately in dealing with her and in creating a position which would have guaranteed her old salary rather than put her on a partial commission. To support his argument, Snead points to an MDM who received an enhanced PCS position when his job was eliminated while he was on disability leave. The fact that another disabled employee may have received more favorable treatment than Snead does not give rise to the inference of disability discrimination. See Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046 (6th Cir. 1998) (disabled employee allowed to remain on leave of absence longer than the disabled plaintiff). Disability laws protect

employees with disabilities from being treated differently than employees without disabilities. The proper comparison is a person within the protected class to a person who is not a member of the class, not between two members of the class. See Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) (should not compare reasonable accommodation of different disabled employees).

I also do not think the fact that McIntosh and Moore did not make the final decision to remain with a single MDM in Portland until after Snead notified them that she was able to return to work raises an inference of a discriminatory motive. It is undisputed that Todd had performed the job alone since the summer of 1995. There was no need to formally eliminate the second MDM position until Snead reported her ability to return to work.

In summary, I conclude that Snead has not raised a genuine issue of fact that she was discriminated against because she is disabled under the statute.

Because of this conclusion, I do not need to address the parties' arguments concerning whether Snead is disabled under the statute or whether Snead seeks a remedy that is available from McIntosh under the statute.

CONCLUSION

Defendants' motion for summary judgment (#14) is GRANTED. All claims are dismissed against both defendants.

DATED this 16th day of December, 1998.

/s/ Garr M. King
GARR M. KING
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EMILY SNEAD,

Plaintiff,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE CO., a Rhode Island corporation, and JAMES MCINTOSH,

Defendants.

Case No.CV98-163-K

ORDER

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KING, Judge:

Defendants' motion for summary judgment (#14) is GRANTED. All claims are dismissed against both defendants.

IT IS SO ORDERED.

DATED this 16 day of December, 1998.

/s/ Garr M. King
GARR M. KING
United States District Court Judge

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JUDGMENT

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KING, Judge:

Based on the record,

IT IS SO ORDERED AND ADJUDGED that this action is dismissed.

DATED this 16 day of December, 1998.

/s/ Garr M. King
GARR M. KING
United States District Court Judge